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## The Enforcement of International Criminal Law: Fact or Fiction?

by Robert A. Friedlander\*

**T**o the famous question posed by Professor Georg Schwarzenberger more than three decades ago as to whether or not an international criminal law really exists,<sup>1</sup> a definite answer, subject to certain qualifications, can now be given. There is an international criminal law—recognized by many different countries and self-contained legal systems in one form or another, applicable to a variety of proscribed activities of one type or another, regulated by numerous treaties and conventions seeking to establish one specific standard or another. Particular goals on the international criminal level are in fact easily identified, but claims on behalf of an established order are as yet premature.

Non-English speaking scholars and publicists seem to prefer the term international penal law, and a difference in emphasis exists not only in terminology but also in focus. Indeed, a distinction can be made between the common law approach and that of its European counterparts. Common law concerns, when given international application, are likely to center upon substantive criminality, while civilian and socialist perspectives are aimed at penalty and punishment. This is not to say that the requirements of procedure or process are either ignored or omitted, but rather that serious difficulties are bound to arise when there is an attempt to combine adversarial with accusatorial principles.

To borrow from the words of Professor Bos: "How indeed is one to devise any notion at all responsible for the elaboration . . . of an entire legal order?"<sup>2</sup> The two most obvious examples which indicate the difficulties and the potentialities of an international criminal law are the long debated, but no longer awaited, international criminal court and the re-

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<sup>1</sup> Schwarzenberger, *The Problem of International Criminal Law*, 3 CURRENT LEG. PROBS. 263 (1950), reprinted in INTERNATIONAL CRIMINAL LAW 3-36 (G. Mueller & E. Wise eds. 1965) [hereinafter cited as INTERNATIONAL CRIMINAL LAW].

<sup>2</sup> G. VAN HOOFF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 14 (1983) (quoting Professor Bos).

cently proposed, already controversial international criminal code. It is now almost sixty years since the International Law Association first suggested the creation of an international criminal court, which the world community has been debating at various intervals ever since.<sup>3</sup> A major obstacle—as yet, an insuperable one—is the role of any international criminal tribunal in a direct enforcement system. The history of public international law over the past three and a quarter centuries has demonstrated clearly and convincingly that direct enforcement in a community of mutually competing and unequal sovereignties has rarely occurred. When it has been imposed at all—let alone in a juridical sense—it has been imposed by sovereign states cooperating for a specific purpose, either on the basis of mutual assistance or through adherence to treaty and convention.<sup>4</sup>

## I. BACKGROUND

Proposals for an international criminal code first began in this century with those of Professor Quintiliano Saldña at the Hague lectures in 1925<sup>5</sup> and then by Professor Vespasian Pella in a seminal study published the very next year.<sup>6</sup> Despite the Nuremberg Judgment, the Nuremberg Principles,<sup>7</sup> the Genocide Convention,<sup>8</sup> and the Apartheid Convention,<sup>9</sup> to name only a few relevant instruments, there has been no discernible movement from within the world community to construct an operative international criminal code. The most recent endeavor to draft a meaningful document has been that of Professor M. Cherif Bassiouni, Secretary-General of the International Association of Penal Law (IAPL), who reshaped a number of contributions by selected experts from that same organization.<sup>10</sup>

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<sup>3</sup> See B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS* (1980). The most recent proposal, along similar lines, was that of an international skyjacking court put forward by U.N. Secretary-General U Thant in a little noticed and less remembered speech of September 14, 1970 commemorating the 25th anniversary of the United Nations. See 8 *PUBLIC PAPERS OF THE SECRETARIES GENERAL OF THE UNITED NATIONS, 1968-1971*, at 472 (A. Cordier & M. Harrelson eds. 1977).

<sup>4</sup> Regional enforcement systems, particularly the one associated with the European Court of Human Rights, are a special case and outside the scope of this analysis.

<sup>5</sup> 1 B. FERENCZ, *supra* note 3, at 42-43.

<sup>6</sup> *Id.* at 43.

<sup>7</sup> 28(a) U.N. GAOR Supp. (No. 12), U.N. Doc. A/1316 (1950), *reprinted in* 2 B. FERENCZ, *supra* note 3, at 236-39.

<sup>8</sup> Convention on The Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1961) [hereinafter cited as Genocide Convention].

<sup>9</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 Nov. 1973, 18 U.N.T.S. 3.

<sup>10</sup> M. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980).

The Bassiouni Code, as it has come to be called within the confines of the IAPL, was first submitted to the United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Caracas during August 1980. It was then resubmitted, for additions, corrections, and modifications to a seminar of the Association of International Penal Law which met at Siracusa, Italy, in May 1982. The latter participants in effect agreed to disagree with the strongest criticism and opposition coming from, surprisingly, the European members.<sup>11</sup> At present the Code appears to be in a state of legal limbo until the designated working groups can work out their differences.

A criminal or penal statute in and of itself, let alone an international criminal code, is at best an indirect enforcement model. Yet, enforcement remains the name of the game, or to put it in terms of a famous common law maxim, a law badly enforced is worse than no law at all.<sup>12</sup> But enforcement of what and against whom? At this moment in time the focus is blurred, due in part to the dichotomy developing between penalists and publicists.

Is there a tendency when drafting an international code, especially in writing criminal statutes, to criminalize internationally that which is merely domestic criminality? Or to put it another way, are there crimes purely municipal which have been criminalized on the international level because they are outrageous acts when viewed in a world community context?<sup>13</sup> Should the projected code codify that which is already agreed upon or criminalize conduct over which there is vast disagreement? Is the emphasis to be primarily criminal or to be primarily international? International criminal law fundamentally deals with human wrongs and, therefore, its mirror image is the international protection of human rights. Is, in fact, the identification of internationally protected human rights analogous to the codification of criminally proscribed international

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<sup>11</sup> See *Le projet de Code Pénal International: commentaires*, 52 REVUE INTERNATIONALE DE DROIT PENAL 331 (1981) [hereinafter cited as *Code commentaires*].

<sup>12</sup> Cf. G. VAN HOOF, *supra* note 1, at 116: "A rule that is repeatedly violated in practice . . . will eventually lose its legal character."

<sup>13</sup> International Terrorism, for which there is still no generally accepted definition, constitutes the best example. The global debate over the nature and consequences of terror-violence appears to be endless. See for example, the latest Report of the Secretary-General, Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of those forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and Which Causes Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes, U.N. Doc. A/38/355 (1983). A somewhat positive view of U.N. approaches to the Global terrorist challenge can be found in J. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS 180-99 (1982). *Contra* Green, *The Legalization of Terrorism*, in *TERRORISM: THEORY AND PRACTICE* 180-91 (Y. Alexander, D. Carlton & P. Wilkinson eds. 1979).

conduct?<sup>14</sup>

## II. STATE RESPONSIBILITY

The concept of an international criminal law contains a variety of paradoxes.<sup>15</sup> One of the most perplexing relates to the responsibility of states. It is common wisdom that states, although they are the major subjects of international law, cannot be held to criminal liability: "The state as an international person cannot be held criminally liable because there is no criminal responsibility without guilt, and the state as a whole . . . cannot be placed in the dock . . . ."<sup>16</sup> For the twentieth century, and arguably throughout modern history, state violence has been the major catalyst for international change. Estimates range as high as ten million civilian casualties alleged to have occurred from the countless political conflicts of the post-charter era.<sup>17</sup>

### A. State Aggression

Not surprisingly, therefore, from the very first draft international criminal code proposed by the Interparliamentary Union in October 1925<sup>18</sup> to the recent Bassiouni Code,<sup>19</sup> state aggression is placed at the head of the list of proscribed international conduct. The United Nations twenty-fifth anniversary Declaration on Principles of International Law bluntly proclaims: "A war of aggression constitutes a crime against the peace, for which there is responsibility under international law."<sup>20</sup> The General Assembly's Definition of Aggression, passed by consensus in December 1974 after more than a quarter century of debate and disagreement, repeats in article 5, section 2, the prior prohibition: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility."<sup>21</sup> Article 19 of the International Law Com-

<sup>14</sup> Cf. Nanda, *International Crimes under the Draft International Criminal Code: A Commentary* in *Code commentaires*, *supra* note 6, at 427-38; Lombois, *Observations sur l'avant-projet de Code Pénal International et rapport final sur les débats du séminaire international de l'Institut de Syracuse sur l'avant-projet* in *Code commentaires*, *supra* note 11, at 531-43.

<sup>15</sup> Mueller, *International Criminal Law: 'Civitas Maxima'*, 15 CASE W. RES. J. INT'L L. 1, 6 (1983).

<sup>16</sup> B. JANKOVIĆ, PUBLIC INTERNATIONAL LAW 148-49 (1984).

<sup>17</sup> 'Small Wars' Penetrate New Corners of Map, *The Blade* (Toledo), July 17, 1983, D, at 1, col. 5; cf., *A World at War*, *The Chicago Tribune*, June 28, 1983, § 4, at 22, col. 4 (a more conservative survey focusing on the past decade).

<sup>18</sup> 1 B. FERENCZ, *supra* note 3, at 249.

<sup>19</sup> M. BASSIOUNI, *supra* note 10, at 52-55.

<sup>20</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among the States in Accordance with the Charter of the United Nations, G.A. Res. 2625(xxv), 25 U.N. GAOR Supp. (No. 28) at 122, art. 1, U.N. Doc. A/8028 (1971).

<sup>21</sup> Resolution on The Definition of Aggression, G.A. Res. 3314(xxix), 29 U.N. GAOR Supp. (No. 31) at 144, U.N. Doc. A/9631 (1974).

mission's Draft Articles on State Responsibility, completed in August 1979, is entitled: "International crimes and international delicts." The first paragraph of section 2 reads as follows:

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.<sup>22</sup>

Once again a Draft Code of Offenses against the Peace and Security of Mankind is under active United Nations consideration. What makes this latter document specifically different from the previously cited instruments is that even though article 2 criminalizes aggression in a similar fashion, article 1 makes all offenses against the peace and security of mankind "crimes under international law, *for which the responsible individuals shall be punished.*"<sup>23</sup>

Can there be collective liability and punishment for state conduct deemed to be criminal under contemporary international law? Most commentators reject the notion altogether<sup>24</sup> or avoid the issue,<sup>25</sup> but there are others who tend to be more cautious. Starke, for example, indicates that the evolving notion of state responsibility may eventually "advance to the stage where States are fixed also with responsibility for breaches of international law which are 'international crimes', as distinct from normal responsibility for breaches . . . to make reparation or pay compensation."<sup>26</sup> Although Professor Munch allows that penal responsibility of states in international law is not "unthinkable," he also admits that present attitudes do not indicate any support for this concept. In fact, he concludes in a rather pessimistic vein that such an approach "would presuppose a change in the constitution of the community of

<sup>22</sup> Report of the International Law Commission, U.N. Doc. A/34/194 (1979), *reprinted* in 18 I.L.M. 1557, 1573 (1979).

<sup>23</sup> 9 U.N. GAOR Supp. (No. 9) at 10, U.N. Doc. A/2693 (1954) (emphasis added). For the renewed attempts to draw up an acceptable and meaningful Code, *cf.* Thiam, Special Rapporteur, First Report on The Draft Code of Offenses Against the Peace and Security of Mankind, International Law Commission, 35th Sess., U.N. Doc. A/CN.4/364 (1983); Thiam, Special Rapporteur, Second Report on the Draft Code of Offenses Against the Peace and Security of Mankind, International Law Commission, 36th Sess., U.N. Doc. A/CN.4/377 (1984); McCaffrey, *Current Developments: The Thirty-Fifth Session of the International Law Commission*, 78 AM. J. INT'L L. 457, 457 (1984).

<sup>24</sup> The classic criticism can be found in Schwarzenberger, *supra* note 1.

<sup>25</sup> I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (3rd ed. 1979) is a typical example. Ian Brownlie's most recent statement casts further doubt on the traditional view: "Unfortunately, the precise legal incidents of an 'international crime' in respect of states are a matter of uncertainty." I. BROWNIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY—PART I 33 (1983).

<sup>26</sup> J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 320 (8th ed. 1977).

states . . . ."<sup>27</sup> What of *de facto* or *de jure* outlawry in which either regional or global peacekeeping organs impose sanctions against states whose conduct has been proscribed by international agreement? According to Margaret Doxey: "The machinery exists, but the capability and will to work it are lacking."<sup>28</sup> The distinguished political analyst, Raymond Aron, is even less reassuring: "The concrete obligations of international law cannot be enforced by sanctions: they remain prescriptive, like morality."<sup>29</sup>

Yet, it is not correct to infer that recent international law has refused to apply a variety of universal moral standards, violations of which—even when done by states—may be deemed to be criminal. It is true that Justice Robert Jackson, Chief American Prosecutor at the Nuremberg War Crimes Trial, denied that a state could actually commit a crime, arguing instead that criminality is a personal concept.<sup>30</sup> But it is also true that the victorious allies in both world wars treated the defeated states as criminal entities. Article 231 of the Treaty of Versailles assigned to Germany and her allies the responsibility for causing a war of aggression, and by that war guilt made Germany liable for a huge reparation settlement.<sup>31</sup> The Treaty also stripped Germany of her entire colonial possessions in addition to a considerable amount of both territory and population.<sup>32</sup> Thus Germany was subjected to both criminalization and punishment. She had been declared, *ex post facto*, an outlaw state and was not admitted to the community of nations until 1926. It was necessary, declared French Premier Georges Clemenceau, "to admit in international law the principle of responsibility which is the basis of domestic law."<sup>33</sup>

The Nuremberg Judgment, following the Second World War, is an

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<sup>27</sup> Munch, *State Responsibility in International Criminal Law*, 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 150, 154 (M. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as M. Bassiouni & V. Nanda]. See also McCaffrey, *supra* note 23, at 457, 457-60 (1984), for a description of the most recent International Law Commission developments relating to state responsibility.

<sup>28</sup> M. DOXEY, ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT 13 (1971). She reluctantly concludes: "In considering international sanctioning, however, we are looking not at a simple sequence of law enforcement, but a complicated pattern of political interaction between sovereign states, in which the system is not valued more highly than its component parts." *Id.* at 138. *Contra*, emphasizing the importance of political symbolism, see de Kieffer, *The Purpose of Sanctions*, 15 CASE W. RES. J. INT'L L. 295 (1983).

<sup>29</sup> R. ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 112 (R. Howard & A. Fox trans. 1967).

<sup>30</sup> Wright, *The Law of the Nuremberg Trial*, in INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 268.

<sup>31</sup> Treaty of Peace Between Germany and the Principal Allied and Associated Powers, June 28, 1919, Part VIII, sec. 1, 225 Parry's T.S. 189-393.

<sup>32</sup> Germany was forced to cede ten percent of its population and thirteen percent of its territory.

<sup>33</sup> P. RENOUVIN, LE TRAITÉ DE VERSAILLES 93 (1969).

even more powerful condemnation of German criminal state conduct: "To initiate a war of aggression, therefore, is not only an international crime: it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>34</sup>

Despite the impossibility of placing the German state in the dock at Nuremberg, Germany was on trial along with its major war criminals. There can be no doubt that the allies intended to punish the German nation as well as its captured leaders. In a letter to the head of the Salvation Army, President Harry Truman left no doubt on this point: "Due to their barbaric practices, we have a stern duty to teach the German people that hard lesson that they must change their ways before they can be received back into the family of peaceful civilized nations."<sup>35</sup> Or, to quote from the Potsdam Protocol of August 2, 1945: "[T]he German people . . . cannot escape responsibility for what they have brought upon themselves . . ."<sup>36</sup> The Yalta Conference meetings, declarations, and documents are replete with references to the "dismemberment of Germany," sizeable reparations, and enforced disarmament.<sup>37</sup>

After careful reflection upon the Versailles and Nuremberg precedents, one cannot avoid the conclusion that if aggression is to be included in the taxonomy of international crime, then states as well as individuals must be held to account for their wrongdoing.<sup>38</sup> One must also note, however, that the drafters of the Genocide Convention pulled back from the notion of state responsibility for genocidal acts.<sup>39</sup> The difficulties of initiating and developing a meaningful international criminal law, when dealing with state sponsored or state fostered violations of prevailing norms, are similar to those relating to the international protection of human rights. Who bears the penalty for human rights violations? To be even more precise, what are the penalties? Who is to enforce them, and where are the mechanisms? One partial answer is the creation of

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<sup>34</sup> 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: OFFICIAL DOCUMENTS 186 (1947).

<sup>35</sup> Quoted by B. SMITH, REACHING JUDGMENT AT NUREMBERG 47 (1977). See also the directive of Secretary of State Cordell Hull sent to General Dwight D. Eisenhower, on September 22, 1944: "The German people must be made to understand that all necessary steps will be taken to guarantee against a third attempt by them to conquer the world." U.S. DEP'T STATE, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS—THE CONFERENCES AT MALTA AND YALTA 1945, 143 (1955) [hereinafter cited as YALTA].

<sup>36</sup> Protocol of the Proceedings of the Berlin Conference, August 2, 1945, part II. A.3.(1)(b)(ii). 2 U.S. DEP'T STATE, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS—CONFERENCE OF BERLIN 1945, 1502 (1960).

<sup>37</sup> YALTA, *supra* note 35, at 562-825, 968-71, 928-83.

<sup>38</sup> *Contra* Munch, *supra* note 27, at 154: "What victors do to the vanquished is no proof of international law."

<sup>39</sup> *Id.* at 148.



regional systems such as that of the European Community (but even this structure has loopholes and imperfections). An easier solution for this particular conundrum is to place aggression back within the realm of customary international law to be dealt with by existing treaties, conventions, and the U.N. Charter. Penalties or sanctions, if applied by whatever means, would be political and *not* criminal. International criminality would then attach only to persons and not entities.

### B. *Apartheid*

The "crime" of apartheid presents similar difficulties. A customary norm may have indeed developed proscribing all forms of racial discrimination,<sup>40</sup> but the definition offered by the International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>41</sup> is not only vague and overbroad, but duplicates in broad measure proscriptions already contained in other international instruments. Article II seeks to prohibit in sweeping terminology conduct described in the International Covenant on Civil and Political Rights (1966),<sup>42</sup> the International Covenant on Economic, Social and Cultural Rights (1966),<sup>43</sup> and the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>44</sup> Moreover, article III of the *Apartheid* Convention which designates "international criminal responsibility,"<sup>45</sup> is not altogether clear as to subjects of its application, whether they be individuals, groups, governments, or an entire people. *Apartheid* is declared to be "a crime against humanity,"<sup>46</sup> but as Professor Janković observed about the Nuremberg War Crimes Trials, how does one place an entire nation in the dock?<sup>47</sup> The *Apartheid* Convention specifically denounces the racial segregation and discriminatory practices of South Africa, without clarifying how they will be analogized to other states and cultures. Finally, there is the perpetual complication—as with all human rights issues short of peremptory norms—of Article 2(7) of the U.N. Charter.<sup>48</sup>

Professors Bassiouni and Derby have proposed the creation of an international criminal court to exercise jurisdiction over crimes of

<sup>40</sup> See Nafziger, *Nonaggressive Sanctions in the International Sports Arena*, 15 CASE W. RES. J. INT'L L. 329, 335 (1983) (hints that racism and apartheid may be prohibited by the *jus cogens*). An intensive analysis of the 1965 Convention on the Elimination of Racial Discrimination is provided by N. LEARNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (1970).

<sup>41</sup> G.A. Res. 3068 (xxvii), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

<sup>42</sup> G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

<sup>43</sup> *Id.* at 49.

<sup>44</sup> Genocide Convention, *supra* note 8.

<sup>45</sup> See G.A. Res 3068 (xxvii), *supra* note 41, at 76.

<sup>46</sup> *Id.* at 75.

<sup>47</sup> Resolution on the Definition of Aggression, *supra* note 19.

<sup>48</sup> U.N. CHARTER art. 2, para. 7.

*apartheid*.<sup>49</sup> Individuals, groups, organizations, and apparently states are subject to conviction and penalty,<sup>50</sup> but in addition to the problems previously mentioned, the likelihood of an *apartheid* court is even less foreseeable than that of an international criminal court, or for that matter a genocide court. The best approach to racial discrimination on the international level is to deal with malefacing governments by invoking the traditional punitive modalities of customary international law and those prescriptive measures which are permitted by the United Nations Charter. It should not be forgotten that at present no western state has ratified the *Apartheid* Convention.

### C. Genocide

If the prohibition of genocidal activities has become part of the *jus cogens* as the drafters of the Vienna Convention on the Law of Treaties seemed to imply,<sup>51</sup> then why has there been absolutely no interest in creating a genocide court, as provided for in article VI of the Genocide Convention?<sup>52</sup> For that matter, given the rampant genocidal activities which have been carried on throughout the globe since the drafting of the Genocide Convention, one could just as easily argue that genocide itself has become a peremptory norm!<sup>53</sup> On this critical human rights question the world community seems to have relegated the Nuremberg Judgment to the status of a legal anomaly and an historical oddity. If the world cannot prevent genocide from occurring on a widespread scale, how will it be able to effectively sanction *apartheid* or racial discrimination?

Throughout the post-charter decades, the writings of publicists have in the main treated the aforementioned conduct, often engaged in by states, as criminal acts, though matters of jurisdiction, process, and punishment have never been authoritatively settled. Treaty, convention, customary practice, and the *opinio juris*, however, have treated individuals as the proper subjects of international criminality. Pirates and piracy, for example, have long been considered *hostes humani generis* and subject to municipal apprehension and jurisdiction.<sup>54</sup> So-called aerial piracy, a

<sup>49</sup> Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

<sup>50</sup> *Id.* at 540, 549.

<sup>51</sup> Edwards, *Contributions of the Genocide Convention to the Development of International Law*, 8 OHIO N.U.L. REV. 300, 305-06 (1981).

<sup>52</sup> See Genocide Convention, *supra* note 8.

<sup>53</sup> Cf. L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY (1982); Leiser, *Victims of Genocide*, 8 OHIO N.U.L. REV. 315 (1981).

<sup>54</sup> Cf. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); Sundberg, *Piracy: Air and Sea*, in 1 N. Bassiouni & V. Nanda, *supra* note 27, at 455-68; Rubin, *Is Piracy Illegal?*, 70 AM. J. INT'L L. 92 (1976).

term that has engendered some academic dispute<sup>55</sup>—a better view is that of interference with air transport—is prohibited by three international conventions.<sup>56</sup>

#### D. Terrorism

Although Whiteman insists that political terrorism on an international level is proscribed by the *jus cogens*,<sup>57</sup> the Bassiouni Code quite properly refrains from including terrorism on its list of international criminal acts.<sup>58</sup> On the one hand, it is discomfoting that at this point in time the world community still cannot agree upon a mode of identification or a means of controlling international terrorism.<sup>59</sup> On the other hand, there is really no need for a special category of terrorist offenses since terrorism consists of acts universally condemned as common crimes by every civilized society.<sup>60</sup>

Without a body of international legislation, and absent codification by treaty or convention, the only way to ascertain international criminality is to apply existing international instruments which prohibit and penalize such conduct. It also has the added advantage of placing an emphasis upon voluntary compliance, particularly through the concept of *pacta sunt servanda*.<sup>61</sup> Utilizing a strict documentary focus, Dr. Farooq Hassan refers to eight purely individual criminal acts of an international character.<sup>62</sup> The Bassiouni Code lists twenty forms of wrongful conduct, but does not distinguish between types of actors who may be involved in the proposed substantive crimes.<sup>63</sup> Consolidation, rationali-

<sup>55</sup> See Van Pantiuys, *Aircraft Hijacking and International Law*, 9 COLUM. J. TRANSNAT'L L. 1, 4-12 (1970); Shubber, *Is Hijacking of Aircraft Piracy in International Law?*, 43 BRIT. Y.B. INT'L L. 193 (1968-1969).

<sup>56</sup> Tokyo Convention of Offenses Committed on Board Aircraft, September, 1963; The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, December, 1970; Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September, 1971; reprinted in 2 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 1-7, 101-05, 107-12 (1979).

<sup>57</sup> Whiteman, *'Jus Cogens' in International Law with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625 (1977). Terrorism is ranked fourth on her list, preceded by piracy.

<sup>58</sup> M. BASSIOUNI, *supra* note 10, at 49-51.

<sup>59</sup> See Murphy, *Legal Controls and the Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465 (1982); Friedlander, *Terrorism and International Law: Recent Developments*, 13 RUTGERS L. REV. 493, 493-511 (1982).

<sup>60</sup> See generally R. FRIEDLANDER, *TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL* (1983).

<sup>61</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 26, U.N. DOC. A/Conf. 39/27, reprinted in 18 I.L.M. 679 (1969).

<sup>62</sup> Hassan, *The Theoretical Basis of Punishment in International Criminal Law*, 15 CASE W. RES. J. INT'L L. 39, 58 (1983). He also identifies six other international crimes related to state and governmental conduct.

<sup>63</sup> M. BASSIOUNI, *supra* note 10, at 49-106.

zation, and minimization of prohibited acts must inevitably be the most effective technique of juridical construction. A narrow and restrictive approach to the nature of international criminality enhances the possibility of resolving the direct control dilemma. This type of analysis provides a stark contrast with the uncertain vision offered by the international protection of human rights. Creating, redefining, and enlarging the ever increasing number of human rights claims have inhibited rather than facilitated human rights guarantees.<sup>64</sup> There is a major lesson to be drawn from past experience.

Despite these difficulties, one must concede cooperation and agreement in certain areas. Efforts to prohibit slavery and narcotic drugs or psychotropic substances are two examples of some degree of global common enterprise.<sup>65</sup> Yet, it may very well be as Professor Green suggests that regional systems of proscription and enforcement are the most realistic hope for the future rather than the development of universal enforcement models.<sup>66</sup> Even so, problems relating to the application of the European Convention on the Prevention of Terrorism<sup>67</sup> likewise raise doubts about regional arrangements, especially when the signatory parties are not truly in accord.<sup>68</sup> Although extradition continues to provide the major mode of enforcement in both the European Community and the larger world arena with respect to terrorism and political crimes, the record is not encouraging.<sup>69</sup>

### III. CONCLUSION

Whether there is in fact, as opposed to theory, a truly international criminal law, mutual assistance in criminal matters—including rendition, transfers of prisoners, and exchange of information—does exist. Professor Mueller argues that we are presently in “a twilight zone between no international criminal law and a fully-developed international criminal law . . . .”<sup>70</sup> Dr. Schwarzenberger has not changed his position that the idea of substantive international criminal law is a legal fiction.<sup>71</sup> But sys-

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<sup>64</sup> Friedlander, *Human Rights Theory and NGO Practice: Where Do We Go From Here?*, in *GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES, AND NGO STRATEGIES* 219-27 (V. Nanda, J. Scarritt, & G. Shepherd Jr. eds. 1981).

<sup>65</sup> See M. BASSIOUNI, *supra* note 10, at 80, 95-96.

<sup>66</sup> Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251, 261 (1983).

<sup>67</sup> European Convention on the Suppression of Terrorism, 27 Jan. 1977, ETS No. 90.

<sup>68</sup> Friedlander, *supra* note 59, at 500-01; see also Shupilov, *Legal Assistance in Criminal Cases and Some Important Questions of Extradition*, 15 CASE W. RES. J. INT'L L. 127 (1983).

<sup>69</sup> Friedlander, *supra* note 59, at 499-505.

<sup>70</sup> Mueller, *supra* note 15, at 2.

<sup>71</sup> See Friedlander, *The Foundations of International Criminal Law: A Present-Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983).

tems of enforcement are often structured as multi-tiered mechanisms which become complex only in advanced stages of development.

Traditional Anglo-American perspectives see the whole as greater than the sum of all its parts. Perhaps the best way to fashion a successful model of international criminal law and enforcement is to deal with each part on a separate and distinct basis. As with jigsaw puzzles, the end product is not complete until all the pieces fit together. If the advocates of an international criminal system concentrate on perfecting each piece of the overall puzzle, the final result may surprise *and* suffice.

The civilized world cannot afford to avoid the growing menace of world criminality much longer. There must soon be an answer to Wordsworth's query:

Wither is fled the visionary gleam?  
Where is it now, the glory and the dream?<sup>72</sup>

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<sup>72</sup> W. WORDSWORTH, *Ode on Intimations of Immortality from Recollection of Early Childhood*, IV, 21:22 (1806).